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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91196629
Party	Defendant DUNNIGAN, TIMOTHY P.
Correspondence Address	DUNNIGAN, TIMOTHY P. 8136 HIGHLANDS DR MIDLAND, GA 31820-4382 timdunnigan@mac.com
Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Gamelink, LLC)	
Opposer,)	
)	
v.)	Opposition No. <u>91196629</u>
)	
Timothy P. Dunnigan)	
Applicant.)	
_____)	

**APPLICANT’S MOTION TO DISMISS OPPOSER’S
NOTICE OF OPPOSITION**

Pursuant to 37 C.F.R. § 2.116(a) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, Applicant Timothy P. Dunnigan (“Applicant”) hereby moves the Board to dismiss Opposer’s Notice of Opposition with prejudice for failure to state a claim upon which relief may be granted. Applicant’s Motion embodies his Brief in Support as required by 37 C.F.R. § 2.127(a).

INTRODUCTION

On September 27, 2010, Opposer Gamelink, LLC (“Opposer”) filed a Notice of Opposition against Applicant’s application for GAME LINK & design (Serial No. 77770614). In light of the numerous fatal deficiencies of Opposer’s Notice of Opposition, Applicant hereby moves the Board to dismiss Opposer’s Notice of Opposition with prejudice for failure to state a claim upon which relief may be granted.

ARGUMENT

A motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of the legal sufficiency of the notice of opposition. *Space Base Inc. v. Stadis Corp.*, 17

U.S.P.Q.2d 1216, 1218 (TTAB 1990). In order to withstand such a motion, a pleading must allege such facts as would, if proved, establish that the opposer is entitled to the relief sought, that is, that (1) the opposer has standing to maintain the proceeding, and (2) a valid statutory ground exists for denying the registration sought. *Young v. AGB Corp.*, 47 U.S.P.Q.2d 1753 (Fed. Cir. 1998). The opposition must set forth a short and plain statement showing why the opposer believes it would be damaged by the registration of the opposed mark and state the grounds for opposition. 37 C.F.R. § 2.104(a). An opposer's pleading must include enough detail to give the applicant fair notice of the basis for each claim. See *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (TTAB 1985). In addition, an opposer's pleading must set forth opposer's "claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances" and each claim founded upon a separate transaction or occurrence must be stated in a separate count whenever a separation would facilitate the clear presentation of the matters pleaded. Fed. R. Civ. P. 10(b).

In this case, Opposer's Notice of Opposition is clearly defective for a number of reasons. First, according to the cover sheet generated by ESTTA, Opposer alleges nine distinct grounds for its opposition, namely (1) deceptiveness, (2) false suggestion of a connection, (3) priority and likelihood of confusion, (4) the mark is merely descriptive, (5) the mark is deceptively misdescriptive, (6) dilution, (7) fraud, (8) genericness, and (9) other. However, Opposer's grounds for opposition are only separated into two distinct counts (likelihood of confusion and dilution). These two counts blend different grounds together, they are devoid of sufficient facts and details to give Applicant fair notice of the basis for each of Opposer's claims, and the majority of the paragraphs are not limited to a single set of circumstances. Moreover, Opposer's explanation for the ground titled "other" on the cover sheet generated by ESTTA consists of a

rambling of facts, allegations, and unsupported legal conclusions to which Applicant cannot reasonably be expected to respond and which are specifically incorporated by reference in Paragraph 1 of the Notice of Opposition. Applicant also notes that the ESTTA cover sheet indicates that Opposer itself is the correspondent, but the Notice of Opposition attached with the cover sheet appears to show that Opposer is represented by outside counsel. So, it is not even clear who Applicant should be serving this Motion to Dismiss upon.

CONCLUSION

In sum, Opposer's Notice of Opposition is unquestionably deficient, so much so that Applicant cannot answer it without risking undue prejudice to himself. Therefore, Applicant respectfully requests that the Board dismiss Opposer's Notice of Opposition with prejudice for failure to state a claim upon which relief may be granted.

Respectfully submitted,

TIMOTHY P. DUNNIGAN

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Dated: 11/3/2010

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **MOTION TO DISMISS** has been served by sending said copy on 11/3/2010 via First-Class Mail, postage pre-paid, to:

Gamelink, LLC
537 Stevenson St., Suite 100
San Francisco, CA 94103

Philip Green
Law Offices of Green and Green
1000 4th St., Suite 595
San Rafael, CA 94901

/met20/
Morris E. Turek, Attorney for Applicant